United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7267

United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

NORMANDY MANUFACTURING CORP., L. CLAUSE, S.A., COMPAGNIE D'ASSURANCES LA NEUCHATELOISE, S.A. HANSSEN AND CO., JAGENBERG OF CANADA, BILTMORE HATS, LTD., P.I.E. TRANSPORT, INSURANCE COMPANY OF NORTH AMERICA, COMPAGNIE D'ASSURANCES LA PATERNELLE, THE AMERICAN IMPORT COMPANY, SOCIETE DE PRODUITS CHIMIQUES INDUSTRIELS, COMPAGNIE D'ASSURANCES LES ASSURANCES NATIONALES I.A.R.D., T. RIVOIRE AND FILS, ALLIANZ S.A., S'ASSURANCES, ADIDAS S.A.R.L., THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED, MICHELAN AND CO., PHILIPPE MARTIN ASSUREUR MARITIME, ALSTHOM-SAVOISIENNE, COMPAGNIE D'ASSURANCES LA C.A.M.A.T., CIE HELVETIA SAINT GALL, L'ITALIA, COMPAGNIE AUX DE PARFUMES INC., SIMMONS LIMITED, QUEBEC LIQUOR CORPORATION, HEINRICH EQUIPMENT CORP., DIVISION OF C.T.S. SALES, INC., FIREMAN'S FUND AMERICAN INSURANCE COMPANY, THE HOME INSURANCE COMPANY, TELEFONAKTIEBOLAGET L. M. ERICSSON, SJOFORSAKRINGSAKTIEBOLAGET HANSA, WALDER AND ZANGER INC. and PITT and SCOTT,

Plaintiffs-Appellants,

against

ATLANTIC CONTAINER LINE LTD. and CIE GENERALE TRANSATLANTIQUE, SWEDISH AMERICAN LINES and WALLENIUS LINES, d/b/a CARE LINE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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FOR THE SECOND CIRCUIT

No. 76-7267

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Defendants-Appellees.

APPELLANTS' BRIEF

Statement of Issues Presented for Review

1. Is the Carrier's (ACL's) continuing non-delegable duty to care for cargo for which it issues a bill of lading, exclusive of liability for damage caused by fire.

2. Is the Carrier entitled to delegate responsibility to a joint venture (Care Line) to fulfill its duties from the time the cargo is delivered to the joint venture at the loading port terminal gate until delivered to the terminal gate at the discharge port, and thus escape liability for damage caused by fire when the fault is that of supervisory or managerial personnel in the joint venture to whom such responsibility was delegated.

3. Where the Carrier partnership of six corporations delegates performance of its carrier obligations to a joint venture of three of the six corporations doing business under the trade name "Care Line" does the negligence of a Manager in a company that is both a member of the six corporation partnership and the three corporation joint venture, qualify as an immunity under Section 4 of The Hague Rules [46 U.S.C. Section 1304 (2) (b)] exempting loss due to fire, unless caused by the actual fault or privity of the carrier.

4. Can the dismissal of a complaint of maritime tort against a sub-carrier, be upheld on grounds of *forum non conveniens* where the party claiming the defense is joined in an action against its principal on a bill of lading containing a forum selection clause for the United States District Court for the Southern District of New York, the bill of lading provides that every "condition" contained in the bill of lading in favor of ACL shall be applicable to such sub-carrier, the sub-carrier is named in the mast head of the bill of lading face as "an affiliate," and the bill of lading issued to plaintiffs-appellants provides that such sub-carrier is "deemed to be parties to the contract evidenced by this Bill of Lading made on their behalf by ACL."

5. If this Court reverses the order of summary judgment in favor of defendant Atlantic Container Line Ltd., are the plaintiffs-appellants entitled to summary judgment on their cross motion against Atlantic Container Line, Ltd.

Statement of the Case

Plaintiffs-appellants as cargo owners brought this action in the United States District Court for the Southern District of New York to recover damages in the amount of $859,650.00 against Atlantic Container Line, Ltd. (ACL) a partnership of six corporations, based on allegations of

breach of contract as common carriers of merchandise by water in that they failed to deliver the cargo in the same good order and condition as when received. Plaintiffs-appellants also asserted actions in negligence against Care Line, a joint venture of three of the six members of the ACL partnership: Cie Generale Transatlantique* (CGT), Swedish American Line and Wallenius Lines doing business as Care Line, based on maritime tort in the operation of the SS MONT LAURIER, on which a fire with accompanying explosion on January 13, 1973, resulted in the loss of the ship and cargo.

Defendant ACL filed a motion for summary judgment dismissing the complaint as to them on the basis of the Hague Rules Article II, Section 2, providing exemption from loss or damage arising or resulting from "fire, unless caused by the actual fault or privity of the carrier." A motion on behalf of Care Line for dismissal on the grounds of *forum non conveniens* was brought by the same law firm representing ACL on behalf of the three individually named defendants who in addition to being part of the ACL partnership comprised the Care Line joint venture.

By order of the Court dated September 27, 1974, ACL's motion for summary judgment was deferred pending the completion of specified areas of discovery and the Care Line motion was deferred pending the disposition of ACL's summary judgment motion.

On October 2, 1975, defendants applied for decision on these deferred motions for summary judgment and on March 17, 1976, the parties stipulated that the permitted partial discovery had been completed and that the motions may be restored to the calendar.

On April 23, 1976, this matter came on for oral argument during which the Court granted the defendant ACL's

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* French Line is the trade name used in New York by Compagnie Generale Transatlantique (CGT).

motion for summary judgment as well as defendant Care Line's motion for dismissal on the grounds of *forum non conveniens* and held that the plaintiff's cross motion for summary judgment against ACL, is "moot or denied" requiring that an order be settled on notice. The Court found that the individual responsible for the stowage was Capt. Goby and insofar as there was human error which caused the fire it was Capt. Goby's human error. Capt. Goby was an employee of CGT, a partner in ACL and also one of the three Care Line joint venturers, but nevertheless the Court could not see how Capt. Goby's "knowledge and carelessness" could be attributed to Atlantic Container Line (A 95).

On May 27, 1976, reargument was held pursuant to an order to show cause and the lower Court adhered to its dismissal of the suit, at which time an appropriate order was signed and judgment entered on June 1, 1976.

The notice of appeal was filed on June 4, 1976 with respect to both aspects of the dismissal, as it pertains to ACL and as it pertains to Care Line.

Statement of Facts

The ACL Bill of Lading

The basis for jurisdiction in the action by plaintiffs-appellants against ACL, is a forum selection clause in the bills of lading (A 83) issued at Gottenburg, Bremen and LeHavre which provides in Clause 13:

> "Disputes arising under this Bill of Lading shall be determined at the option of the Merchant either by the Commercial Court in London in accordance with English law or by the U.S. District Court for the Southern District of New York in accordance with the laws of the United States."

Under the terms of the ACL bills of lading it was agreed in Clause 2 dealing with the contracting parties that "ACL only shall be liable as Carrier under this Contract." It was further agreed in Clause 3 that the responsibility for the goods shall be "from the time when the goods are received by ACL at the sea terminal at the port of loading to the time when they are delivered or despatched by ACL from the sea terminal at the port of discharge. . . ."

The bill of lading contains a "Himalaya clause" extending the contractual exemptions and limitations of liability that the carrier has to the servants, agents and independent contractors employed by ACL to carry out its obligations. This "Himalaya clause" in Clause 6 of the bill of lading went beyond the usual Himalaya clause provision mentioned and provided no "sub-carrier employed by ACL to carry out any of its obligations hereunder shall, in any circumstances whatsoever be under any greater liability to the Merchant than ACL for any loss, damage or delay, howsoever caused to the goods, but shall be entitled to the benefit of every exemption, limitation, *condition* and liberty herein contained in favor of ACL. For the purpose of this provision all such persons shall be deemed to be parties to the contract evidenced by this bill of lading made on their behalf by ACL."

(This provision will be referred to in connection with Care Line's *forum non conveniens* defense.)

While the bills of lading were issued on the MONT LAURIER they provided in paragraph 6 that "ACL has the right . . . to carry the goods by any substitute vessel . . .

The bill of lading concludes in bold print:

> "GOODS OF DANGEROUS OR DAMAGING NATURE AND RADIO ACTIVE MATERIAL MUST NOT BE TENDERED FOR SHIPMENT UNLESS WRITTEN NOTICE OF THEIR NATURE AND THE NAME AND ADDRESS OF THE SENDER AND THE RECEIVER HAVE BEEN PREVIOUSLY GIVEN TO ACL SUB CARRIERS, MASTER OR AGENT OF THE VESSEL . . . A SPECIAL STOWAGE ORDER GIV-

ING CONSENT TO SHIPMENT MUST ALSO BE OBTAINED FROM ACL. . . ."

The Vessel—Its Owner and Operator

The MONT LAURIER on which the aforementioned ACL bills of lading were issued to plaintiffs-appellants was not owned, operated or controlled by ACL, as a group. The vessel was owned by Compagnie Atlantique Maritime, a corporation in turn owned by CGT and Wallenius, common members of the ACL and Care Line groups. CGT managed and operated the vessel on behalf of the Care Line joint venturers (A 18).

Relationship Between ACL and Care

The Care Line partners negotiated with their other three partners in ACL an agreement referred to as a "Memorandum of Understanding" dated March 6, 1972 (A 62).

This agreement provided that ACL would charter the weather deck of Care Line operated vessels on a "gate to gate" basis and ACL agents were to ensure that all necessary documentation was prepared to cover cargo shipped under ACL bills of lading. Appendix 2 of the agreement which was not before the Court on the defendants' original motion, but obtained from opposing counsel (A 85) and submitted as part of plaintiffs-appellants' cross motion, and dated March 22, 1972 (A 86) provides that all cargo carried under the agreement, "will be subject to the terms and conditions of the ACL B/L which will be issued to the shipper . . . no Care Line B/L is to be issued for ACL for containers shipped under this agreement but it is understood that the transport is subject to the conditions in the Care Line B/L . . ." Clause 5 of the Memorandum of Understanding further provides: "When Careline accepts an ACL container at the terminal gate it is responsible for the container and its contents until they are collected at the terminal gate at the port of delivery."

Clause 6 provides: "ACL is concerned that its service to its customers is in no way impaired by ACL's participation in Care Line over which ACL has no operational control. It is therefore agreed that ACL and Care Line shall from time to time mutually agree sailing schedules. * * *"

ACL admitted by answers to interrogatories that pursuant to the Memorandum of Understanding dated March 6, 1972, it relied upon Care Line (CGT, Swedish American Line and Wallenius Line) for the proper stowage of all weather deck shipments, the proper stowage of all other goods stowed on board the vessel (i.e., shipments carried under Care Line bills of lading and stowed on other decks of the vessel) and examination of all dangerous and other cargo carried anywhere on board the vessel as well as the exercise of due diligence to make the vessel in all respects seaworthy (A 16). Care Line admitted that it relied upon CGT's Capt. Rene Goby and his assistants for the proper stowage of all weather deck shipments and the proper stowage of all other goods on board the vessel (A 16). Capt. Goby testified that the purpose of preventing the stowage of incompatible cargoes in the same area of the vessel was to prevent damage to other cargoes and the vessel itself and he understood ACL relied upon him to do his job correctly (A 52). ACL testified similarly by its operations manager adding that this was a duty owed to shippers (A 39, 42) and they "make sure" local port agents are not stowing incompatible cargoes in the same area (A 38).

The Chairman of the Board of Directors of ACL's operating company, Philip Bates, testified that the position of ACL is that by virtue of the "Memorandum of Understanding" the entire responsibility for the cargo was delegated to Care Line on delivery of the cargo to the terminal gate (A 31, 32).

Capt. Goby Performing A Managerial Function

CGT, a member of both ACL and Care Line, a general agent for both, selected one of its employees, Capt. Goby who is the ACL terminal manager at LeHavre, to act as Care Line Cargo Co-ordinator. His nomination for this position was made by Mr. Mirobent, an alternate member of the Board of Directors of ACL (A 26) and Chairman of Care Line (A 49).

To place Capt. Goby within the corporate hierarchy his immediate supervisor in CGT is Capt. Jauny-Gervais, the general agent for both ACL and Care Line who in turn reported to the aforementioned Mr. Mirobent who reported to the Managing Director of Compagnie Generale Transatlantique, Mr. Ribiere (A 50). Capt. Franberg, the operations manager for ACL operated vessels testified Capt. Goby performed the same function and had the same responsibilities as he, in the operation of Care Line vessels (A 43). Exhibit 1 shows he was a part of high management meetings in French Lines participation in Care Line.

Capt. Franberg testified that he referred any questions of stowage of ACL cargo on Care Line operated ships to Capt. Goby (A 43). Capt. Goby testified that in performing his services as Care Line co-ordinator he was doing this "for the protection of all the cargo on the ship . . ." and that included ACL cargo on the weather deck (A 52) and that the services he performed were pursuant to the "Memorandum of Understanding" (A 53).

The Voyage

On or about January 2, 1973, the MONT LAURIER sailed from Gottenburg with cargo belonging to some of the plaintiffs-appellants stowed on the weather deck pursuant to ACL bills of lading. On or about January 5, 1973, additional cargo was loaded to the weather deck at the port of Bremen, belonging to other plaintiffs-appellants in this action under ACL bills of lading.

At this same port of Bremen Care Line pursuant to Care Line bills of lading, loaded on the "b" deck or trailer deck, an area reserved by CGT for Care Line cargo, plastic cans of a product known as fixapret in Section 2 midship, and in Section 3 portside, a dangerous chemical in drums known as sodium chlorite. (Mulroy affidavit and exhibits on behalf of Plaintiffs, March 8, 1976.) The vessel then went to LeHavre, where Capt. Goby has his office and acts as termiinal manager for ACL as well. Here, the remaining plantiffs-appellants' cargo was loaded to the weather deck on or about January 8, 1973, under ACL bills of lading.

The vessel then proceeded to Montreal and during the voyage the liquid fixapret leaked from the plastic drums and spread out all over the deck. At 1830 hours on January 13, 1973, the whole cargo broke free of lashings at 1905 hours smoke was noted and at 1910 hours an explosion occurred causing the loss of plaintiffs-appellants' cargo stowed on the weather deck above the trailer deck where the fire and explosion occurred (A 55).

Lower Court Findings

For the purpose of the defendants' motion for summary judgment the lower Court found this incompatible cargo on the trailer deck was improperly stowed resulting in a fire which caused the damage to the cargo in this suit, and that the person responsible for this stowage was Capt. Goby (A 94). The Court found that it was his "human error" which caused the fire, that he was an employee of CGT, one of the Care Line joint venturers and also one of the partners in ACL and that he was also the terminal manager for ACL in LeHavre (A 94).

For purpose of this appeal it appears unnecessary to go into the reaction of fixapret in contact with sodium chlorite, and the statutes relating to stowage in view of the lower Court's findings although set forth in plaintiffs-appellants' cross-motion papers transmitted with the record.

The Court made no finding that Capt. Goby was not managerial personnel, nor did the Court find anyone other than Capt. Goby had the duty to continuously protect ACL cargo on the weather deck from negligent conditions in other parts of the vessel.

The Court recognized Capt. Goby as Care Line coordinator "wore two hats", but held his negligence was with respect to the stowage of Care Line cargo on the Care Line deck, and if there was a fire on the Care Line deck "it wasn't ACL's problem" and the duty of stowing ACL cargo on the weather deck didn't apply (A 96).

Summary of Argument

The lower court did not perceive ACL's statutory duty to plaintiffs' cargo was not merely to stow it on the weather deck, but to take care that no danger to that cargo exists any place on the ship before loading or be permitted to come into being any place on the vessel after loading.

The reason the lower court did not recognize ACL's duties as a "carrier" was because of confusion of its relationship with Care Line whereby ACL was a space charterer and Care Line had operational control of the ship.

Not being able to appreciate the extent of ACL's duties the court did not follow that when ACL delegated its duties to Care Line it delegated its continuing duty of care to ACL's cargo as well as the physical act of loading ACL cargo on the weather deck.

Hence the court expressed the attitude that (A 96) if Care Line negligently caused a fire on Care Line's trailer deck "it wasn't ACL's problem" that plaintiffs' cargo was destroyed.

None of the foregoing reasoning of the trial court is based on ACL's legal position set forth in its Application for Decision on Deferred Motions for Summary Judgment

(A 88), but the ensuing argument is intended to cover defendants' position as well.

POINT I

Lower court erroneously denied the existence of carriers continuing non-delegable duty to care for cargo for which it issues a bill of lading.

Under The Hague Rules which are virtually the same as the U.S. Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et seq.*, with respect to the statutory duty imposed by law, Judge Staley writing for the Court of Appeals in *The Saturnia*, 226 F. 2d 147 (2 Cir. 1955), affirming 123 F. Supp. 282 (S.D.N.Y. 1954), succinctly points to the carrier's statutory duty in stating at page 150:

> "* * * The respondent's duty was to properly stow, carry, keep and care for the cargo, 46 U.S.C. § 1303 (2). *This duty continues at all times,* and unless the respondent shows that it could not have performed its duties because of some excuse cognizable under the law as sufficient to relieve it from liability, it must assume full responsibility. * * *" (Italics added)

The operations manager of ACL, Captain Franberg testified at length to the steps he takes for ACL as carrier (A 36/39) under bills of lading identical to those issued to appellants here (A 42) to prevent or correct incompatible stowage of cargo on a vessel. He stated this was a duty owed cargo under the bills of lading (A 42).

Captain Franberg testified he did not perform this function with respect to appellants' cargo nor did anyone in ACL and he expected this function to be performed by Care Line (A 41/42).

The District Court on ACL's motion for summary judgment found the cause of the fire for purposes of the case

was caused by improper stowage of incompatible cargo on the MONT LAURIER (A 94).

The fact that the fire originated on the trailer or "b" deck of the vessel has no more significance to cargo owners' rights to recovery than did the fact that the fire occurred in the engine room in *The Marquette, sub nom. Asbestos Corp. Ltd. et al.* v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.* (U.S.D.C.-S.D.N.Y. 1972), 345 F. Supp. 814, 1972 A.M.C. 2581.

The Hague Rules governing the contracts of carriage between appellants and Atlantic Container Line, Ltd., provide as follows (with the corresponding reference to the United States Carriage of Goods by Sea Act set forth parenthetically):

> Section 1. (46 U.S.C. § 1301)
>
> When used in this Act—
>
> (a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> (b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
>
> * * *
>
> Section 2. (46 U.S.C. § 1302)
>
> Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, cus-

tody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Section 3. (46 U.S.C. § 1303)

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Having noted then that the "carrier" is responsible to furnish a ship fit and safe for the reception, carriage and preservation of the cargo we proceed analytically substituting the word "carrier" referring to ACL for the word "shipowner" appearing in *The Marquette, supra,* where the shipowner is the carrier-defendant and in any other case referred to.

In *The Marquette,* the Court continued further on:

"It is incumbent upon every shipowner to provide a seaworthy vessel, equipped with adequate means of fighting fire on board. The standard is whether it is reasonable for a shipowner to provide certain apparatus to meet the contingency of fire. *Hines* vs. *Butler, supra, Christopher* vs. *Grueby, supra.* What is reasonable is what is required in light of all the circum-

> stances. This court has no interest in imposing an unreasonable or higher standard than required upon the shipowner. Minimal foresight, however, dictates that the engine room is a highly volatile compartment of a ship and the possibility of fire breaking out is ever present. A shipowner must anticipate and provide for the contingency that a fire may break out in the engine room, disabling all fire fighting equipment located in the engine room. The owners of the *Marquette* through their 'design or neglect' and 'privity or knowledge' were negligent in placing all fire fighting equipment inside the engine room and failing to provide an emergency pump or fire system located or controlled from outside the engine room. This negligence on the part of the shipowners displays a total disregard for minimal protection of cargo and rendered the Marquette unseaworthy. Under the circumstances this court concludes that the defendant-shipowners are not exempt from liability under Cogsa, section 1304 (2) (b) or the Fire Statute."

The point is then that where the fire occurs is irrelevant to this case and to a "carrier's" duty.

The carrier's duty to the Gothenburg cargo did not end when it was placed on a seaworthy ship because the loading of the incompatible and dangerous cargo occurred at the next port which was Bremen. The result is the same for the Bremen cargo and for the cargo subsequently put on at LeHavre placing it on a ship that was unseaworthy from the time of its loading at Bremen.

Judge Tenney in *International Produce Inc.* v. *S.S. Francis Salman, et al.,* 1975 A.M.C. 1521 (no official citation), cited a number of authorities in which the problem of stowage on board ship of cargoes causing damage to other cargoes previously or subsequently placed on board that vessel with corresponding findings of fault on the car-

rier at p. 1535. But precedent clearly holds that it is not necessary for cargo to be damaged because of negligence in the loading and stowing of that cargo and a carrier is liable for the safe loading and stowage of other cargo to be sure that it does not subsequently cause damage to the plaintiff's cargo. In other words, ACL again washed its hands of its obligations to the plaintiff by simply saying that Care Line properly loaded plaintiff's cargo on deck and at least with regard to the Gothenburg cargo it put it on a seaworthy ship.

In a decision by Judge Learned Hand, *Edmond Weil Inc.* v. *American West African Line* (*The West Kebar*), 147 F. 2d 363, 1945 A.M.C. 191 (2d Cir. 1945), on deck cargo broke loose and rolled about the deck breaking off some capped tubes creating holes in the deck through which seawater entered and damaged the cargo below. Judge Hand said "the safety of the cargo stowed below deck was therefore absolutely dependent upon the continued solidity of the" cargo stowed on deck. The testimony of Goby and Franberg indicates that the safety of the plaintiff's cargo on deck would be dependent on the cargo below deck not exploding and causing a fire.

In *Knott* v. *Botany Worsted Mills*, 179 U.S. 69, 21 S. Ct. 30 (1900), the Supreme Court had a case in which sugar was loaded in one compartment and wool was loaded in another. At the time of sailing with each of the two cargoes the ship was seaworthy. As a result of subsequent loadings and discharging the trim of the ship changed causing the sugar cargo to damage the wool cargo. The Court said that the change of trim was "the mere neglect resulting from *the changes* in the loading . . . this damage arose through negligence in the particular mode of stowage and changing the loading of cargo" at subsequent ports and the carrier was held answerable for the damage.

Even though the carrier was wearing a different hat while they were loading and discharging other cargoes—

they were negligent as to cargo already on board although as with the Gothenburg cargo in this case the ship was seaworthy on that sailing. See also *Mitchell Beck & Co., Inc.* v. *S.S. Steel Voyager*, 1957 A.M.C. 1515 (S.D.N.Y. 1957). (No official citation.)

The lower court is in error in exempting ACL from its statutory duty of continuing care for cargo covered by its bills of lading and in construing that duty in so narrow a context, i.e., loading on the weather deck irrespective of the danger to cargo coming from other parts of the vessel and other decks of the ship.

POINT II

Lower court erroneously afforded fire defenses to charterer-carriers that would not apply to owner-carriers.

ACL space chartered only the weather deck or (a) deck of the MONT LAURIER from Care Line and Care Line wouldn't tell them what Care Line was carrying on the rest of the ship for competition reasons although ACL never asked them to (A 44, 46/47). The presiding officer of ACL, Mr. Bates, said that ACL was in the role of shipper and Care Line in the role of carrier to them under a Care Line bill of lading although none was formally issued (A 33) and "entire responsibility for the cargo was delegated to Care Line" (A 31).

A carrier's statutory duties to cargo under bills of lading are not diminished where that carrier is charterer of a ship as distinguished from owner. *Luckenbach* v. *McCahan Sugar Co.*, 248 U.S. 139 (1918).

In *Trans-Amazonica Iquitus, S.A.* vs. *Georgia S.S. Co.*, 335 F. Supp. 935 (1971), Judge Lawrence in the Southern District of Georgia held a carrier is not relieved of its contractual obligations to cargo because another corporation

is in operational control of the vessel. The Court said notwithstanding that the sub-charterer

> "had little to do with the vessel other than engaging her for the particular voyage and paying the charter hire"

it was liable since the bills of lading were issued on its printed form and they described the sub-charterer as the carrier.

In *Reid* v. *Fargo*, 241 U.S. 544 (1916) an express company accepting a bill of lading was held liable to a cargo owner as if it were a carrier even though stevedore negligence caused the damage.

In *Luckenbach et al* v. *W. J. McCahan Sugar Refining Company and The Insular Line, supra*, Mr. Justice Brandeis delivering the opinion of this Court to shipowners claim that he was not responsible to the charterer to maintain the vessel, said:

> "In operations . . . the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners . . ."

The lower court was not impressed by these cases because they did not involve fire losses (A 93 and Minutes of Reargument 5/27/76, p. 26). Yet the U.S. Carriage of Goods by Sea Act identical to The Hague Rules involved here provides without reference to fire or other types of catastrophies and without distinction between carrier-charterers and carrier-owners.

Corporate owners cannot escape liability by giving the managerial functions to agents, *The Silverpalm*, 94 F. 2d 776 (1937). Care Line was certainly committed by ACL to the general management and superintendence of the loading and handling of ACL's cargo on the MONT LAURIER within the meaning of *The Erie Lighter 108*, 250 F. 490, 494 (1918).

Since limitation of liability has been denied when corporate knowledge has been found with a marine superintendent, *In Re Pennsylvania R. Co. No. 131,* 48 F. 2d 559 (1931), the owner's agent who supervises and approves methods of stowage, *Wilbur et al* v. *Williams S.S. Co.*, 9 F. 2d 940 (N.D. Cal. 1925), the fire exemption must be denied based on the knowledge of Captain Goby and CGT.

The Court in *Huilever S.A. etc.* v. *The Otho*, 49 F. Supp. 945, 947 (S.D.N.Y. 1943) Aff'd. 139 F. 2d 748 (2 Cir. 1944) at 947 said:

> "The duty of the carrier to use due diligence is not satisfied by delegating that duty to a third person (citing cases)."

POINT III

The negligence of Capt. Goby constitutes actual fault or privity of ACL.

For purposes of "actual fault or privity" under the fire statute case law indicates the same meaning to the words as under the Limitation Act, 46 U.S.C.A. § 183 applies. *The Edmund Fanning* (*Petition of United States*), (S.D. N.Y. 1952) 105 F. Supp. 353, 371; 201 F. 2d 281.

Judge Learned Hand in *Great Atlantic and Pacific Tea Co.* v. *Lloyd Brasileiro* (*The Pocono*), 159 F. 2d 661, 664 (2 Cir. 1947) after stating the tests are the same under the Fire Statute as under the Limitation Section defined the privity of a corporation as "anyone to whom the corporation has committed general management or general tendency of the whole, or a particular part of his business." A broad delegation of authority through a person makes that person's knowledge or privity the owner's knowledge or privity. *In re New York Dock Co.*, 61 F. 2d 777 (2d Cir. 1932).

The lower court in its memorandum and order dated September 27, 1974 incorrectly narrowed the proposition

that courts have found that "fault of managing agents to whom the corporation delegates the task of inspection, decisions on precautions and the like is the fault of the owner". [See *Consumers Import Co.* v. *Kabushiki Kaisha*, 320 U.S. 249, 252; *Askell & Douglas, Inc.* v. *United States*, 13 F. (2d) 555 (2 Cir. 1926); *The Edmund Fanning, supra*] into the proposition

> "If plaintiffs could show that the fire was caused by the fault of managing agents to whom ACL delegated the task of inspection, decisions on precautions and the like, that fault could be imputed to ACL. See Asbestos Corp. Ltd. v. Compagnie, etc."

On plaintiffs showing fault on the part of CGT's Capt. Goby, the Court said he wears two hats acting for Care Line and ACL, and in effect his fault in "causing" the fire was while he wore his Care Line hat.

If in this regard plaintiffs-appellants understand the lower courts reasoning it seems to be based on its own narrow interpretation of causation.

Knowledge by Captain Goby acting for ACL of what he negligently did or failed to do acting for Care Line is enough to establish the privity of ACL. *Bowen et al* v. *Mount Vernon Savings Bank, et al.*, 105 F. 2d 796, 797 (D.C. Cir. 1939); *McSweeney* v. *Prudential Ins. Co. of America*, 128 F. 2d 660, 661 (4th Cir. 1942); *United States* v. *Ridglea State Bank et al.*, 357 F. 2d 495, 498 (5th Cir. 1956); *Hartford Accident & Indemnity Co.* v. *Hartley*, 275 F. Supp. 610, 618, aff'd, 389 F. 2d 91 (5th Cir. 1968).

At the time of Captain Goby's negligent act in permitting the improper stowage of incompatible cargoes on the trailer deck or "b" deck of the MONT LAURIER, he was simultaneously negligent in failing to prevent that improper stowage or correcting it after it took place as to the ACL cargo on the weather deck or "a" deck to which he owed an independent duty of protection under the ACL bills of lading and Memorandum of Understanding.

As to ACL, the negligence is not that he caused the fire but he is deemed to have knowledge of a dangerous condition he failed to correct.

In *The Law of Admiralty,* Gilmore and Black, Second Edition, 1975, the authors at page 881, exploring the question of knowledge of persons depended upon by corporations being imputed so as to constitute actual fault or privity under the Limitation Statute refer in footnote 91 to The Glenbogie,

> "The statute does not require that knowledge be actual; it may be imputed if someone in charge for the owner had general authority to act for him and by the exercise of ordinary care could have discovered the fault."

The measure of ACL's duty to plaintiffs-appellants is not what ACL knows, but what it is charged with finding out. *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro, supra,* p. 665. Judge Hand in that case also stated the carrier or corporate officers may have to push inquiries home to the ship, to examine logs, and to make themselves acquainted with all the information (159 F. 2d 664).

In this respect see also the *Cleveco-Admiral,* 59 Fed. Supp. 71 (D.C.N.D. Ohio, E.D. 1944), aff'd 154 Fed. 2d 605 (6 Cir., 1946) where the Court of Appeals at page 613 held:

> "We come then to consideration of the question whether appellant had knowledge of the fact that the Admiral was unseaworthy, as liability, in these cases, may be limited only where the loss was incurred without the privity or knowledge of the owner of the vessel. Title 46 U.S.C.A. § 183. Where a corporation is the owner of a vessel, the knowledge of the marine superintendent having general control and direction of its business is the knowledge of the corporate owner of the vessel. Eastern S.S. Corporation v. Great

> Lakes Dredge and Dock Co., 1 Cir., 256 F. 497; and, within the section of the statute limiting liability knowledge means not only personal cognizance *but also the means of knowledge*—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it. See The Chickie, D.C. Pa., 54 F. Supp. 19; The Mattie, D.C. N.Y. 38 F. Supp. 745, affirmed Jacobus Granwiller Co. v. Reichert, 2 Cir., 136 F. 2d 904; Petition of Liebler, D.C.N.Y., 19 F. Supp. 829." (Emphasis supplied)

and at page 614:

> "* * * the burden is upon an owner, seeking limitation of liability upon the statute, to prove lack of knowledge or of the *means of knowledge* on his part or that of his marine superintendent that his vessel was unseaworthy. The E. Madison Hall, 4 Cir., 140 F. 2d 589, certiorari denied, W. E. Valliant Co. v. Rayomier, Inc., 322 U.S. 748, 64 S. Ct. 1159, 88 L. Ed. 1579; The Marguerite, 7 Cir., 140 F. 2d 491; The Silver Palm, 9 Cir., 94 F. 2d 776; Henson v. Fidelity & Columbia Trust Co., 6 Cir., 68 F. 2d 144; in re Eastern Transportation Co., D.C. Md. 37 F. 2d 355, modified The Calvert, 4 Cir., 51 F. 2d 494. * * *"

The Court went on to point out:

> "* * * In order to prevail, therefore, it is not necessary for appellees (death or other claimants) to prove knowledge or means of knowledge on the part of appellant (vessel owner) that the tug was unseaworthy."

In *Austerberry* v. *United States*, 169 F. 2d 583 (6th Cir. 1948), the Court said at page 594:

> "Privity, like knowledge, turns on the facts of particular cases. Coryell v. Phipps, 317 U.S. 406, 63 S. Ct. 291, 87 L. Ed. 363. A corporation, as does the gov-

ernment in this case, acts through human beings. The privity of some of those persons must be the privity of the government, else it could always limit its liability. As the Supreme Court said in a similar case involving a corporation: 'Hence the search in those cases to see where in the managerial hierarchy the fault lay.' Coryell v. Phipps, supra, 317 U.S. page 411, 63 S. Ct. page 293. 'While the cases generally speak of the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to the largeness of their authority.' In re P. Sanford Ross, Inc., 2 Cir., 204 F. 248, 251."

"The burden was upon the government to prove that it had no privity or knowledge of negligence, or that there was no privity or knowledge or the means of knowledge of negligence on the part of those to whom it had delegated the duties of commanding, maintaining, and operating the vessel. Coryell v. Phipps, 317 U.S. 406, 63 S. Ct. 291, 87 L. Ed. 363; The Cleveco, 6 Cir., 154 F. 2d 605. * * * There is no evidence that anyone in charge of the vessel for the government was interested in taking any precautions in this regard. * * * We fail to find from the evidence that the government sustained the burden of proving that it had no privity or knowledge, or that there was no privity or knowledge on the part of those to whom it had delegated the duty of commanding and operating the vessel and maintaining it in a safe condition."

The lower court in this case overlooked the knowledge Capt. Goby had of his own neglect as the knowledge of ACL thereby creating a dangerous precedent by which carriers need only delegate their duties to avoid carrier responsibility.

Defendant ACL in its Rule 9 (g) Statement in support of its Motion for Summary Judgment claims it had "no connection with or knowledge of the cause of the fire" (A

8), a claim that is expressly controverted by Plaintiffs' Rule 9 (g) Statement that as a matter of law Care Lines activities are as managing agents for ACL (A 11).

It is this type of evasion of responsibility that the court struck down in *Waterman Steamship Corporation* v. *Gay Cottons,* 414 F. 2d 724, 732 (9th Cir. 1969):

> "Yet it is clear that an owner cannot close its eyes to what prudent inspections would disclose. An owner must avail itself of whatever means of knowledge are reasonably necessary to prevent conditions likely to cause losses. 'If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners would be at a premium'. The Argent, *supra,* 1940 A.M.C. at 509."

The charterer-carrier ACL made a total delegation of its function to Care Line's Capt. Goby as testified to by its Chairman of the Board making Capt. Goby's knowledge (or what he should have known) the "privity and knowledge" of ACL.

POINT IV

The lower court should have denied the Care Line motion for dismissal on the grounds of *forum non conveniens.*

There are no cross claims between defendants in these proceedings. Both ACL and Care Line are represented by the same counsel and filed a joint answer to the complaint.

Defendants have composed a strategy by which all hope to escape the consequences of their action.

As the Court has seen ACL the carrier contends it had "no connection with or knowledge of the cause of the fire" since the MONT LAURIER was operated by "others" (A 7). In Care Lines' motion based on *forum non conveniens* de-

fendant's memorandum states "the contract between Care Line and ACL specifically provides that ACL bills of lading shall not bind Care Line . . . the owner or operator of a vessel is not liable for damage to cargo shipped under bills of lading issued by a charterer, where the charterer had no authority to bind the owner or operator." Care Line claims "special circumstances exist to show justice would be better subserved by declining" jurisdiction. *The Belgenland,* 114 U.S. 355 (1884). But no showing of prejudice has been factually made out and as indicated in the Statement of Facts special circumstances exist here for retaining the case.

The motion by Care Line was not supported by affidavits, but a legal memorandum only.

The position of plaintiffs-appellants is that the three Care Line joint venturers were fully familiar with the terms of the ACL bill of lading.

The Chairman of the Board of ACL testified (Bates deposition p. 53/54):

> "Q. Did the member companies authorize or approve the placing of their name on the masthead of the Atlantic Container Line bills of lading, Atlantic Container Line Ltd. bills of lading, as affiliated companies? That's the first question.
>
> If the answer to that is no, the next question is, is it your understanding that each of the member companies was aware of the masthead of the Atlantic Container Line bills of lading showing them to be affiliated companies without protest?
>
> A. In respect to those two questions, without checking, I can say that in 1972, the period we are talking about, none of the shareholders had objected to the form of the bill of lading and I am certain that they were all aware of it."

Since Clause 6 of the bill of lading provided Care Line "shall be deemed to be parties to the contract evidenced by this bill of lading made on their behalf by ACL" for purposes of giving Care Line the benefit of every "condition" of the bill of lading including the forum selection clause, the position claimed by ACL's attorneys on behalf of their Care Line client is not consistent with the integrity of the instrument.

There is every indication that under German Law the forum selection clause of the ACL bill of lading would automatically be enforced in West Germany so as to defeat any claim against Care Line. *Allianz Versicherungs-Aktiengesell* v. *S.S. Eskisehir* (S.D.N.Y. 1971) 334 F. Supp. 1225, 1227.

A motion of this type places the burden of proving prejudice on the moving party, *Foster* v. *United States Lines Company*, 188 F. Supp. 389, 391 (S.D.N.Y. 1960) a burden Care Line did not meet. The same witnesses to be called by Care Line necessarily would be called by ACL on the trial of that case. There is a strong overriding consideration in this case favoring the litigation of related claims in the same tribunal. *Schneider* v. *Sears*, 265 F. Supp. 257, 266-67 (S.D.N.Y. 1967); *Freiman* v. *Texas Gulf Sulphur Co.*, 38 F.R.D. 336 (N.D. Ill. 1965); *Axe-Houghton Fund A, Inc.* v. *Atlantic Research Corp.*, 227 F. Supp. 521, 523 (S.D.N.Y. 1964); *Rodgers* v. *Northwest Airlines, Inc.*, 202 F. Supp. 309, 312 (S.D.N.Y. 1962); *Cressman* v. *United Airlines*, 158 F. Supp. 404, 407 (S.D.N.Y. 1958).

For these reasons it is error to dismiss Care Line on the grounds of *forum non conveniens* in a forum and under the law which they would otherwise seek the benefit of.

POINT V

Plaintiffs-appellants are entitled to summary judgment on their cross-motion against ACL.

Plaintiffs' affidavit, exhibits and testimony answering defendant ACL's Motion for Summary Judgment made a Cross-Motion for Summary Judgment in favor of plaintiffs-appellants on liability and submitted a Rule 9 (g) Statement (A 9) to which Defendant ACL did not reply other than a Rule 9 (g) Statement which did not controvert the contentions of Plaintiffs cross-motion but claimed factual issues the negative of which was assumed by ACL for the purpose of its motion for summary judgment.

Defendant ACL did not come forward with any affidavits, testimony or evidence in opposition to the massive testimony on fault and privity, but relied on the Rule 9 (g) statement only. This is not enough to defeat plaintiffs' cross-motion.

"But even though the moving party's papers consist solely of affidavits if they are sufficient and the opposing party's papers if any, do not raise any triable issue, then summary judgment may be rendered for the party entitled thereto under applicable principles of substantive law, unless, pursuant to Rule 56 (f), the opposing party shows sufficient reasons why he is presently unable to present by affidavit facts essential to justify his opposition." 6 Pt. 2 Moore's Federal Practice § 56.15 [4]

On reargument pursuant to an order to show cause heard on May 27, 1976, plaintiffs advised the Court of its view that without Certification of the denial of plaintiffs' cross-motion for summary judgment as to ACL that denial is not appealable. The lower Court stated they could not certify if there are contested facts (p. 26) and, "If in the record before it the Court of Appeals feels that you are entitled to a judgment, they will grant it. My certification would not add anything to it." (p. 30)

If the denial of plaintiffs' cross-motion is appealable without certification, and if ACL's Rule 9 (g) statement is inadequate opposition as Moore's indicates this Court is respectfully requested to grant summary judgment to plaintiffs-appellants on the basis of the testimony of Captain Goby, Captain Franberg and Mr. Bates and the exhibits submitted to the District Court.

CONCLUSION

The order of the District Court dismissing plaintiffs' complaint on the merits against Atlantic Container Line, Ltd. and dismissing plaintiffs' complaint against defendants Cie. Generale Transatlantique, Swedish American Lines and Wallenius Lines should be entered in favor of plaintiffs-appellants against defendant Atlantic Container Line, Ltd. and the matter remanded to the District Court for trial of the issues outstanding.

Respectfully submitted,

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Attorneys for Plaintiffs-Appellants

MARTIN B. MULROY,
Of Counsel

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 6TH day of AUGUST 1976.

Haight, Gardner, Poor & Havens

Attorneys for APPELLEES